Supreme Court, U.S.
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No. 92-1559

In The

Supreme Court of the United States

October Term, 1992

IMEE MARCOS-MANOTOC,

Petitioner,

v.

AGAPITA TRAJANO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court grant review to decide potentially far-reaching questions of constitutional law in a case in which the Petitioner defaulted on the merits and in a situation where Congress has recently passed a statute that almost entirely eliminates any future significance of a decision by this Court?

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STATEMENT OF THE CASE

In August 1977, Archimedes Trajano, a college student, was tortured for 36 hours and then summarily executed by personnel who were acting under the authority of Petitioner. This event led to the decision of his mother, the Respondent Agapita Trajano, to leave the Republic of the Philippines to start a new life in Hawaii, where she has lived since 1982. In 1986, Respondent filed this suit against Petitioner and others in the U.S. District Court for the District of Hawaii.

Petitioner – who had come with other members of her family to Hawaii and was then staying with them – was properly served in Hawaii, but she failed to answer the Complaint filed against her, and later fled the jurisdiction. The district court subsequently assessed damages, entered judgment against Petitioner, and certified the judgment as final pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Petitioner now lives outside the United States. She has not submitted to a deposition in aid of execution, and she has failed to satisfy the judgment or post a supersedeas bond while appealing to the U.S. Court of Appeals for the Ninth Circuit and now to this Court.

Petitioner has not challenged the court's personal jurisdiction over her in any of her appeals. Moreover, because of her failure to answer the Complaint, Petitioner has waived all defenses except those regarding the subject-matter jurisdiction of the court, and all of the facts necessary to establish liability and the jurisdiction of the district court are deemed admitted. Petitioner is seeking to use the present Petition to reopen issues that are foreclosed because of the default judgment.[1]

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[1] This Petition is the fifth Petition or Application that has been filed by a member of the Marcos family to this Court during the past seven years. *Araneta et ux. v. United States*, 479 U.S. 924 (1988) (brought by the Petitioner's sister and her husband); *Ferdinand Marcos et ux. v. United States*, 484 U.S. 890 (1987); *Ferdinand and Imelda Marcos v. United States*, 488 U.S. 952 (1988); *Ferdinand and Imelda Marcos v. Republic of the Philippines*, 490 U.S. 1035 (1989).

REASONS FOR DENYING THE WRIT

The issues raised by Petitioner are not appropriate for review. The unanimous decision of the U.S. Court of Appeals for the Ninth Circuit, written by Circuit Judge Pamela Rymer, is not in conflict with any decision of this or any other court. In addition, this case is unique because it involves a default judgment. Finally, because Congress recently passed the Torture Victim Protection Act (TVPA), described below, which would clearly authorize actions of the kind at issue here, resolution of the issues presented would have little or no future applicability.

1. No federal court that has addressed the issues identified by Petitioner has reached a result inconsistent with any of the holdings of the U.S. Court of Appeals for the Ninth Circuit in the present case. *See Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C.Cir. 1984) (Edwards, J., concurring); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987) and 694 F. Supp. 707 (N.D.Cal. 1988); and *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.D.C. 1985), *reversed on other grounds*, 736 F. Supp. 1 (D.D.C. 1990). *See also Linder v. Portocarrero*, 963 F.2d 332 (11th Cir. 1992) (recognizing a federal cause of action under diversity jurisdiction for acts of tortūre and summary execution). Moreover, the overwhelming majority of commentators on the subject have supported the result reached in these decisions.[2] Indeed, Petitioner makes no

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[2] *See* articles cited in David Cole, Jules Lobel & Harold Hogju Koh, *Interpreting the Alien Tort Statute: Amicus Curiae Memorandum of International Law Scholars and Practitioners in*

claim of inter-circuit conflict; she simply argues that the decision below is in error.

2. This civil lawsuit satisfies all the usual procedural requirements required by a civil claim, and does not present any important recurring issues. Petitioner was properly served in this case and does not raise any issues regarding personal jurisdiction. She was living in Hawaii with her family when she was served in 1986, she remained in the United States for the next several months before fleeing the country, and she had ample other ties with Hawaii and the rest of the United States to establish personal jurisdiction. The Respondent has lived in Hawaii since 1982. This case does not, therefore, present a case of "forum shopping," or present any other basis for this Court's review. And, as the Ninth Circuit noted in an earlier opinion in this case, "[n]either the present government of the Republic of the Philippines nor the United States government objects to judicial resolution of these claims, or sees any resulting potential embarrassment to any government." *Trajano v. Marcos*, C.A. Nos. 86-2448, 86-15039, Memorandum Opinion (9th Cir. July 10, 1989).

The Court of Appeals correctly characterized Respondent's claim as a "transitory tort . . . which follows the tortfeasor wherever he goes," and which can be brought in U.S. federal courts when personal jurisdiction is obtained and the tort violates international law. Pet. App. 19a. The Ninth Circuit had previously surveyed international law and had concluded that "it would be

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Trajano v. Marcos, 20 Hastings Int'l & Comp. L. Rev. 1, 23 n.78 (1988).

unthinkable to conclude other than that acts of official torture violate customary international law." *Siderman de Blake v. Republic of Argentina*, 965 F. 2d 699, 717 (9th Cir. 1992). In fact, that opinion found that "the prohibition against official torture occupies a uniquely high status among norms of international law" and constitutes a violation of a "*jus cogens* norm." Pet. App. 13a (citing *Siderman, supra*, 965 F.2d at 717).

Moreover, because this case involves a default judgment, many issues that would normally be raised by this type of claim are not present in this case. Among the issues not raised in the present case that would be involved in a "typical" case of this sort are the issues of *forum non conveniens*, the sovereign immunity that might attach to a government official, what conduct is unprotected by that immunity because it is outside the "outer perimeter" of governmental conduct, whether such sovereign immunity has been waived by the current government, who has the burden of proving an immunity claim, what statute of limitations should apply and whether it should be tolled, and how the choice-of-law principles should be applied to each of these issues. Because of the default, none of these issues is before the Court.

3. Congress's recent enactment of the Torture Victim Protection Act (TVPA), Pub. L. 102-256, 106 Stat. 73, 28 U.S.C. sec. 1350 note (1993 Supp.), dramatically reduces the future significance of the issues raised by Petitioner. On March 12, 1992, President Bush signed the TVPA into law, and it will almost certainly govern future cases of this kind. Congress explicitly reaffirmed in the TVPA that the federal courts of the United States should be open to

the claims of victims of torture who have suffered at the hands of foreign government officials, if they can obtain personal jurisdiction over these officials. This statute is not identical to the Alien Tort Claims Act, 28 U.S.C. sec. 1350 invoked in the present case, but the two statutes intersect. It is, therefore, probable that most torture victims in the future will invoke the Torture Victim Protection Act, along with the Alien Tort Claims Act, as well as federal question jurisdiction under 28 U.S.C. sec. 1331 and diversity jurisdiction under 28 U.S.C. sec. 1332, when they are applicable. Accordingly, the issues raised by Petitioner regarding the Alien Tort Claims Act are likely to have extremely limited applicability to future cases.

The legislative history of the TVPA clearly explains its design and purpose – to ensure that U.S. courts would remain open to victims of torture and extrajudicial killings committed under color of law outside the United States. The reports of the Judiciary Committees of the Senate and House (*The Torture Victim Protection Act of 1991: Report No. 102-249 of the Senate Judiciary Committee,* 102d Cong., 1st Sess. (Nov. 26, 1991), and *Torture Victim Protection Act of 1991: Report No. 102-367 of the House Judiciary Committee,* 102d Cong., 1st Sess. (Nov. 25, 1991)) contain essentially identical language providing the background and purpose of this statute. They explain that the TVPA was designed to reconfirm Congress's recognition of the existence of a private right of action for victims of torture and extrajudicial killings. In explaining why the TVPA was needed when the Alien Tort Claims Act was already in place, these two reports state that the TVPA builds on the Alien Tort Claims Act "in an important

respect: while the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad." Senate Rpt. No. 102-249 at 5; House Rpt. No. 102-367 at 4.[3] The passage of the TVPA also confirms the commitment of the United States to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984), which the United States ratified in 1990.

Congress's power to enact the TVPA and the Alien Tort Claims Act has been clearly established by the precedents of this Honorable Court. *See, e.g., Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 481 (1983) (the "arising under" clause of Article III authorizes Congress to confer jurisdiction on U.S. courts to recognize claims brought by a foreign plaintiff against a foreign defendant); *Ex Parte Quirin,* 317 U.S. 1, 28 (1942) (Article I, Section 8, Clause 10 authorizes Congress "to define and punish . . . Offenses against the Law of Nations); *The Paquete Habana,* 175 U.S. 677, 700 (1900) (the law of the United States includes international law).

4. Petitioner argues strenuously that the decision of the Ninth Circuit is inconsistent with *Argentine Republic v.*

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[3] Because of the enactment of the TVPA, "it is too late in the day" to argue that Congress had intended some different result when it enacted the Alien Tort Claims Act back in 1790. *See Franklin v. Gwinnett County Public Schools,* 112 S.Ct. 1028, 1039, 117 L.Ed. 2d 208, 225 (1992) (Scalia, J., concurring, joined by Rehnquist, C.J., and Thomas, J.).

Amerada Hess Shipping Corporation, 488 U.S. 428 (1989). The fundamental difference between the present case and *Amerada Hess* (and between the present case and *Saudi Arabia v. Nelson*, 61 U.S.L.W. 4253 (U.S., March 23, 1993)) is that in the present case an individual is the defendant, while in *Amerada Hess* and *Nelson* a foreign government was named as defendant. As the Ninth Circuit correctly noted, because Petitioner defaulted in this case, she is deemed to have acknowledged that she was not acting as a sovereign, and hence is not entitled to any claim of sovereign immunity. *See* Pet. App. 8a. Moreover, in the only document Petitioner sought to introduce into evidence in the present case, she asserted "that she was not a member of the government or the military at the time of Trajano's murder." Pet. App. 8a n.10. *See also* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17, reprinted in 1976 U.S. Cong. Code & Admin. News 6604, 6616 (under the Foreign Sovereign Immunities Act, immunity would remain an "affirmative defense which must be specially pleaded, the burden [remaining] on the foreign state to produce evidence in support of its claim"); *Olsen by Sheldon v. Government of Mexico*, 729 F.2d 641 (9th Cir.), *cert. denied*, 469 U.S. 917 (1984) (a foreign state has the ultimate burden of proving its claim of immunity under the FSIA); *Forsythe v. Saudi Arabian Airlines Corp*, 885 F.2d 285 (5th Cir. 1989) (accord); *Transamerica S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998 (D.C. Cir. 1985) (accord).

It is also important to note that the *Amerada Hess* decision did not alter or in any way undercut the force of the Alien Tort Claims Act, which provides jurisdiction in the present case. As this Court stated in *Amerada Hess*:

> The Alien Tort Statute by its terms does not distinguish among classes of defendants, and it of course has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states.

488 U.S. at 439.

5. Petitioner points out that the district court examined Philippine law when assessing damages against her and thereby attempts to show that the basis of the decision against her was not international law forbidding torture, but the domestic law of the Philippines. It is, however, not only logical but also appropriate and necessary for a court that is drawing upon international law principles to look to the rules applicable in domestic legal systems to fill in some of the details required by a claim. The precepts of international law authorize decision-makers to look to "general principles of law" – principles that are common to all the relevant domestic legal systems – to fill in the interstices of law that may not be explicitly codified in the international legal system. *See* Statute of the International Court of Justice, article 38(c), 59 Stat. 1031, T.S. No. 993; Ian Brownlie, *Principles of Public International Law* 16 (4th ed. 1990). This process is similar to the actions of federal judges who look to state law to fill in the details that sometimes are missing from federal statutes. In the present case, the district judge looked to the Civil Code of the Philippines, where the violation of international law took place, for guidance regarding the types of damages that should be awarded. This source was appropriate, particularly since it was consistent with the approach used in many other legal systems, including our own.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 19, 1993

STATUTORY ADDENDUM

ALIEN TORT CLAIMS ACT – 28 U.S.C. § 1350

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

TORTURE VICTIM PROTECTION ACT, P.L. 102-256, 106 Stat. 73

An Act to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Torture Victim Protection Act of 1991".

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) LIABILITY. – An individual who, under actual or apparent authority, or color of law, of any foreign nation –

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) EXHAUSTION OF REMEDIES. – A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) STATUTE OF LIMITATIONS. – No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

SEC. 3. DEFINITIONS.

(a) EXTRAJUDICIAL KILLING. – For the purpose of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) TORTURE. – For the purpose of this Act –

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third

person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from –

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently by subjected to death; severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Approved March 12, 1992.